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DEPARTMENT OF STATE — DIVISION OF COMMUNICATIONS AND RECORDS — TELEGRAPH BRANCH

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Subject: FCI treaty discussions. Mission's despatch No. 3446, April 23, enclosing memoranda of conversation covering the third and fifth informal meetings.

Department's comments follow:

Memo of 2nd Meeting

Article I, paragraph 1 (point 1, reference despatch). It would be acceptable to Department to substitute the word "bodies" for the phrase "tribunals and agencies", if the Japanese finally propose that solution in lieu of simply making a free translation of the present terminology.

Article V, paragraph 2 (point 2, reference despatch). The Department may add to its previous comments that a categorical commitment to enforce all awards except those contrary to "public order or morality" would be more extensive than the U.S. could undertake, because that would be to require the State courts to give more status to a foreign award than they may be willing to give even to a domestic award. Among other grounds on which a court may refuse to enforce an award is lack of compliance with elementary due process (e.g., failure of the arbiters to afford all parties adequate opportunity to be heard). Moreover, a number of the States are still inclined to display a considerable measure of common law conservatism in their approach to arbitration whether domestic or foreign.

Article V, paragraph 3 ("domestication"). The Department's previous comment regarding the significance of the term "domestication" was not intended to imply that this term, when applied to a foreign corporation, necessarily involves rechartering it under domestic law. Rather it might only involve some lesser process of assimilating the status of such corporation to that of the domestic corporation for various domestic legal purposes. So far as the

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as the purposes of Article V, paragraph 1, are concerned, however, the treaty objective appears to be maintained even without the addition of this refinement to the explanation given in the memo of conversation.

Article VI, paragraph 1 (point 3, reference despatch). Although the Department feels there is good logical reason for not extending the national and most-favored-nation treatment standards to this paragraph, it will not be able to insist on this view if the Japanese persevere in their view of the matter, inasmuch as several of the recently signed U.S. treaties contain formulations in effect similar to the Japanese suggestion (those with China, Italy and Uruguay, as well as Greece); and the Department wishes insofar as possible to avoid allowing the Japanese to feel that they are not being treated altogether equally. The Embassy is therefore authorized to offer to accommodate the Japanese on this matter if they seriously revert to it in future discussions. This accommodation would consist of striking the words "paragraphs 2 and 3 of" from the first sentence of paragraph 5. The Department ~~xxxxxxxxxx~~ attaches considerable importance to the concept of "not less than" contained in the statement of the national and most-favored-nation treatment standards in paragraph 5.

Article VI, paragraph 2 (point 4, reference despatch). Acceptability of substituting "unlawful entry or molestation" for "molestation or entry without just cause" is confirmed.

Article VI, paragraph 3. The Department wishes further to observe that whether a particular compensation is "just" could be referred ultimately to the International Court for decision, under Article XXIV, should perchance a difference of opinion ever arise requiring recourse to that body. The fundamental test of compliance with the treat requirement of "just" would be whether the international law test of "just" were met. It may be presumed for present purposes, that the Japanese constitutional req irement for "just" would meet the international law test in the case of an American-owned property, unless and until the contrary is shown; but the existence of this constitutional provision does not create a conclusive presumption.

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It should be observed, generally, that the wording of the various relevant passages of Article VI is intended to make abundantly plain that the national treatment and most-favored-nation treatment clauses are minimum standards in expropriation matters, and that compliance with these standards is not of itself sufficient unless the independent requirements of paragraph 2 are also fulfilled. The Department considers the independent international law standard to be so essential that no treaty formulation on compensation that is not practical as it would be accepted.

Article VI, paragraph 2. (point 5 reference despatch). The essentiality of the proposed transposition of this provision is explained.

Article VI, paragraph 3 (word "taking"). The Department has chosen the word "taking" for its standard draft in preference to other possible choices for the reason that, aside from being familiar in U.S. constitutional jurisprudence, it appears to have the broad flavor of encompassing not only outright governmental seizure, occupation and conversion of property ("expropriation" in its narrowest sense), but reaches the less outright deprivations including tortious invasions of property by the government (whether or not inadvertent) such as are cognizable in the U.S. by the Court of Claims as Fifth Amendment cases not provided for in the condemnation statutes. Substitution of the word "expropriation" has led to be made in certain negotiations, however, as a consequence of translation difficulties.

Article VI, paragraph 5 (point 6 reference despatch). The Japanese proposed assessment of the last sentence is not acceptable, as it would convert the last sentence into a needless repetition of what is already more adequately covered elsewhere in the Article. Their proposal, thus is, would add nothing to the protection already vouchsafed to "nationals and companies", as such, and would create question as to why the last sentence were indeed thought necessary and appropriate. The object of the Department's proposed wording is to go beyond the direct protection of American nationals and companies, already afforded, by

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establishing a rule regarding the enterprises in which they have an important interest, such enterprises being considered juridically distinct from such nationals and companies. It will be noted that these enterprises, as such, are not put under the rule of paragraph 3, which paragraphs would be applicable only as to the property interests which American (or, mutatis mutandis, Japanese) nationals and companies hold therein. However, it would mean, to give one example, that a Japanese factory in which Americans had an important interest should be treated on a non-discriminatory basis in the carrying out of a nationalization program, with respect to such matters as the selection of factories to be nationalized, procedures regulating the transfer of ownership and management to the Government, time allowed for liquidating outstanding contracts, etc.

Memo of 5th Meeting

Articles VIII, paragraph 1 (point 7, reference despatch). Acceptability of Japanese proposed insertion in line eleven is confirmed.

Article VIII, paragraph 1 (discussion top page 2, enclosure No. 2). The Department assumes that the Japanese understand the difference between this paragraph and paragraph 2. If the technical expert is retained only to make "examinations, audits and technical investigations for" and in connection therewith to "render reports to" his employer, "for the exclusive account" of his employer, he is entitled to perform such a special and transitory job without being required to possess the relevant professional license. If the technical investigator were an accountant, for example, paragraph 1 would not require his audit to be given any legal status locally; and such audit would be without prejudice to the right of the government to require an audit to be made by a licensed local accountant for all domestic legal purposes. The purpose of the paragraph is simply to assure the investor the right to have special investigations done by persons who are especially in his confidence for internal management or home office

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purposes, without such person being accused of illegally invading the field of professional practice. Otherwise, persons who wish to discharge functions considered to lie within the field of the regulated profession will be required to comply with the applicable Hawaiian laws, regulations and procedures, as stipulated in paragraph 2.

Article VIII, paragraph 2 (point 3, reference despatch). The Department will agree to an exception for notaries public and port pilots if Congress can also be persuaded to make the exception. The Department proposes that this exception be placed at an appropriate point in the Protocol. It may be temporarily identified as Proposed Document "B-bis" and worded as follows: "The provisions of Article VIII, paragraph 2, shall not extend to the professions of lawyer, notary public or port pilot".

Article VIII, paragraph 3. Department confirms authorization to formulate this last sentence to Article VIII.

Article IX. No comment required on this item. Embassy has perhaps noted that the House of Representatives last week passed the so-called omnibus immigration bill referred to in a previous instruction, which contains provisions repealing the 1924 Immigration Act and removing the racial bars to the immigration and naturalization of Japanese. As a further item of interest, the California Supreme Court on April 17 handed down a decision invalidating the California law which imposed disabilities on Japanese and other ineligible aliens with respect to land rights. This decision follows a similar Oregon Supreme Court decision given in 1949. These two decisions were based on the 14th Amendment to the U.S. Constitution and recent trends in the U.S. Supreme Court's interpretation of that Amendment. (The decision of the Supreme Court of Arkansas in 1927 invalidating an Arkansas anti-alien land law had been based on the State Constitution).

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